

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SAMUEL T. COHEN and JEROME BIRN, on Behalf
of Themselves and All Others Similarly Situated and
Derivatively on Behalf of THE BEAR STEARNS
COMPANIES, INC.,

No. 07-cv-10453 (RWS)
ECF Case

Plaintiff,

v.

JAMES E. CAYNE, *et al.*,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS SAMUEL COHEN AND JEROME BIRN'S MOTION TO APPOINT COUNSEL IN THE DERIVATIVE ACTION

Defendants respectfully submit this response to the motion by plaintiffs Samuel Cohen and Jerome Birn to appoint Brower Piven, A Professional Corporation, and Robbins Umeda & Fink LLP as co-lead counsel in the above-captioned action (the "Motion").

While defendants take no position at this stage on the question of which law firm is the most appropriate candidate for appointment as lead counsel of this and the other pending Bear Stearns-related actions before this Court, defendants submit this response to certain of plaintiffs' arguments in the Motion, including those concerning consolidation of *Cohen* with the other pending lawsuits, to which defendants have already responded by letter. *See* Def. Ltr., dated June 6, 2008; Def. Ltr., dated June 10, 2008.

First, we note as an initial matter that plaintiffs lost standing to assert their derivative claims when Bear Stearns merged with JPMorgan Chase & Co. and plaintiffs ceased to be shareholders of Bear Stearns. Def. Ltr., dated May 30, 2008, at 1-2; *see*

Fischer v. CF & I Steel Corp., 599 F. Supp. 340, 346-47 (S.D.N.Y. 1984); *Friedman v. Mohasco Corp.*, 929 F.2d 77, 79 (2d Cir. 1991); *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984). We intend to file a motion to dismiss the derivative claims on these and other grounds on the schedule set by the Court. In effect, all that remains of *Cohen* is the purported class action claim, which should be consolidated with the other related putative class actions pending in this District. Thus, there is no need for the Court to appoint separate lead counsel for the *Cohen* derivative claims.

Second, plaintiffs' argument that the PSLRA does not apply to derivative claims misses the point. As we demonstrated in our letters, courts have not hesitated to consolidate derivative and class action claims alleging common questions of law or fact. See Def. Ltr., dated June 10, 2008, at 3-4; *Glauser v. EVCI Center Colleges Holding Corp.*, 236 F.R.D. 184, 186 (S.D.N.Y. 2006); *Baughman v. Pall Corp.*, No. 07-CV-3359 (JS) (ARL), 2008 WL 2244979, at *2 (E.D.N.Y. 2008); *In re First Investors Corp. Sec. Litig.*, No. 90-CV-7270 (MJL), 1993 WL 535009, at *1 (S.D.N.Y. Dec. 22, 1993); *Ruggiero v. Am. Bioculture, Inc.*, 56 F.R.D. 93 (S.D.N.Y. 1972). Given the similarities between *Cohen* and the other related Bear Stearns actions, consolidation for pre-trial purposes at a minimum will prevent inefficiencies and duplicative discovery and preserve judicial resources.

Conclusion

While defendants take no position at this stage on the various requests for appointment of lead plaintiff and lead counsel, they maintain that: (1) appointment of lead counsel for the derivative claims is unnecessary because plaintiffs have lost standing to assert such claims; and (2) *Cohen* should be consolidated with the putative securities actions, at least for pre-trial purposes.

Dated: June 27, 2008
New York, New York

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Filed on behalf of The Bear Stearns Companies Inc., James E. Cayne, Alan D. Schwartz, Samuel L. Molinaro, Jr., Alan C. Greenberg, Warren J. Spector, Jeffrey M. Farber, Jeffrey Mayer, Michael Minikes, Henry Bienen, Carl D. Glickman, Michael Goldstein, Donald J. Harrington, Frank T. Nickell, Paul A. Novelly, Frederic V. Salerno, Vincent Tese, and Wesley S. Williams, Jr. upon consent.

AFFIDAVIT OF SERVICE BY FIRST CLASS MAIL

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

Ella A. Capone, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and am employed by Paul, Weiss, Rifkind, Wharton & Garrison LLP, 1285 Avenue of the Americas, New York, New York 10019.
2. On June 27, 2008, I personally served true copies of the foregoing: DEFENDANTS' RESPONSE TO PLAINTIFFS SAMUEL COHEN AND JEROME BIRN'S MOTION TO APPOINT COUNSEL IN THE DERIVATIVE ACTION on the individuals listed in the attached service list.
3. I made such service by personally enclosing true copies of the aforementioned document in properly addressed prepaid wrappers and depositing them into an official depository under the exclusive custody and care of the United States Postal Service in the State of New York.



Ella A. Capone

Sworn to before me this
27th day of June, 2008



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Notary Public

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Notary Public, State of New York
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